



November 16, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: CC Docket 98-141

Dear Ms. Salas:

Enclosed for filing in the above captioned matter, please find an original and twelve (12) copies of **Reply Comments of Level 3 Communications, Inc. In Opposition to Application For Transfer of Control.**

Please acknowledge receipt by date-stamping the enclosed extra copy of this filing and returning it to me in the postage pre-paid envelope provided. If you have any questions regarding this filing please contact me at 204/536-3624.

Sincerely,

Terence J. Ferguson

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enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
Applications for Consent)
to the Transfer of Control of Licenses)
Section 214 Authorizations from)
AMERITECH CORPORATION,)
Transferor)
to)
SBC COMMUNICATIONS INC.,)
Transferee)

CC Docket 98-141

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FEDERAL COMMUNICATIONS COMMISSION
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**REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS, INC.
IN OPPOSITION TO APPLICATION FOR TRANSFER OF CONTROL**

In its initial comments, Level 3 argued that the merger would have anti-competitive effects which could not be alleviated by attaching pro-competitive conditions to merger approval. Instead, the only way to alleviate these effects would be through a structural solution removing the merged company's incentive and ability to deny competitive access to local loops. Consequently, the merger should not be approved without commitment to a structural solution.

Several parties, in their initial comments, advocated attaching conditions to merger approval as a second-best alternative to disapproval.¹ Nevertheless, several comments also described a wide range of anti-competitive behavior by both SBC and Ameritech. The sheer number and variety of anti-competitive activities catalogued in the initial comments confirm Level 3's initial contention that the only way to resolve the problem is a structural solution that removes the incentive and ability to engage in this kind of conduct. It is infeasible for a set of merger conditions – no matter how carefully drafted and even if scrupulously enforced – to address the wide variety of anticompetitive practices that SBC and Ameritech have utilized and will seize upon to thwart market-opening measures.

The initial comments pointed out that SBC has engaged in a stunning catalogue of anti-competitive behavior: requiring a labor-intensive, infeasible process for combining network elements;² illegal conditions attached to access to OSS interfaces;³ misuse of customer proprietary information to win back customers that had switched to a CLEC;⁴ refusal to cooperate with a wireless carrier on billing methods that might encourage additional wireless use;⁵ non-compliance with the obligation to make one paging company's interconnection

¹ E.g., Texas Office of Public Utility Counsel, Pilgrim Telephone, and KMC Telecom.

² MCI WorldCom at 7.

³ Focal Communications at 5-6.

⁴ Focal Communications at 4-5.

⁵ CoreComm Newco at 7-9.

agreement available to all;⁶ charging paging carriers for terminating LEC-originated calls in violation of Commission orders;⁷ tariff restriction inhibiting resale of Centrex services;⁸ refusal to program switches in manner allowing a CLEC to provide expanded area service;⁹ imposition of a separate charge for access;¹⁰ refusal to supply directory assistance data in bulk;¹¹ missing due dates for collocation;¹² refusal to make customer contracts available for resale even after the Commission had ruled that this was required by Section 251(c)(4) of the Act;¹³ refusal to file tariffs complying with provisions of an arbitration award;¹⁴ and failure to offer local transport from the trunk side of the switch as a separate element.¹⁵

In addition, commenters pointed to the statements of the Texas Commissioners that SBC has been guilty of “failure to meaningfully negotiate, reluctance to implement the terms of the arbitrated agreements, . . . [and] behavior which obstructs competitive entry,” thereby requiring

⁶ Focal Communications at 6.

⁷ Paging and Messaging Alliance 4-8.

⁸ McLeodUSA 10.

⁹ e.spire (Kallenbach Aff’t at pp. 7-9).

¹⁰ e.spire (Kallenbach Aff’t at p. 13).

¹¹ MCI WorldCom (Beach-Fauerbach Aff’t ¶¶ 14-15).

¹² e.spire (Kallenbach Aff’t at p. 18).

¹³ KMC Telecom at 9-10.

¹⁴ Consumer Federation of America at 14-15.

¹⁵ e.spire (Kallenbach Aff’t at p. 16).

“tremendous efforts” to obtain competitive entry, “with Bell resisting at every turn.”¹⁶ Finally, commenters pointed to the statement of a federal district court that in an interconnection case SBC had “fought tooth and nail for every single obviously non-meritorious point.”¹⁷

While SBC may be the more recalcitrant of the two merger parties, Ameritech has also engaged in an impressive array of obstructive tactics. The comments describe Ameritech’s refusal to provide shared transport;¹⁸ errors in handling CLEC orders;¹⁹ service personnel disparaging CLECs and quoting longer service dates for CLEC than ILEC customers;²⁰ lengthy outages during cutover;²¹ failure to provide adequate long-term number portability;²² misleading PIC freeze practices;²³ use of calls designed to verify PICs in order to persuade customers not to

¹⁶ Comments of Commissioners Walsh and Curran, quoted by CoreComm Newco at 6.

¹⁷ Statement of district court in Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc. et al., No. A97-CA-132 (W.D.Tex. August 31, 1998), quoted by Hyperion Communications at 13.

¹⁸ MCI WorldCom at 4-5 and attached Beach-Fauerbach Aff’t, ¶¶ 5-8.

¹⁹ CoreComm Newco at 4.

²⁰ CoreComm Newco at 4-5.

²¹ Time Warner Telecom at 6.

²² Time Warner Telecom at 5.

²³ Time Warner Telecom at 7-8.

switch to the CLEC;²⁴ preventing customers with long-term toll contracts from accepting CLEC service;²⁵ failure to maintain names and addresses of CLEC customers on the 911 system;²⁶ discrimination in compensation for cellular and paging traffic;²⁷ bill inserts disparaging competitors;²⁸ discrimination in provision of Feature Group A service;²⁹ dialing parity violations;³⁰ and obstructive tactics in providing UNE combinations.³¹

The Commission must face up to the fact that tactics of this type cannot be dealt with effectively by a proliferation of merger conditions or any other type of direct regulation. Conditions can be drafted to ban specific practices; but these are soon evaded by other activities that may differ in specifics but are equally obstructive. Indeed, evasive tactics will proliferate as new and advanced services become more important and new forms of access are required. And while general prohibitions may be written against bad-faith negotiations or unreasonable access conditions or discriminatory practices, there will always be room for time-consuming litigation

²⁴ MCI WorldCom at 5-6.

²⁵ Michigan Consumer Federation Exh. D.

²⁶ Michigan Consumer Federation Exh. D; Time Warner Telecom at 4..

²⁷ Michigan Consumer Federation Exh. D.

²⁸ Michigan Consumer Federation Exh. D.

²⁹ Michigan Consumer Federation Exh. D.

³⁰ Michigan Consumer Federation Exh. D.

³¹ MCI WorldCom, Beach-Fauerbach Aff't ¶¶ 9, 10.

over what behavior comprises “bad faith” or “unreasonableness” or “discrimination.” Merger conditions would prove ineffective even if they were enforced; and given the shortage of Commission staff and the huge incentive incumbents have to keep effective competition out of the market, effective enforcement is unlikely. Some other solution is needed -- and one is readily available.

The Commission has undoubted authority to impose a structural solution as a precondition of the merger. In the past, the Commission’s imposition of structural separation requirements has been sustained where reasonably necessary to achieve objectives within its jurisdiction. Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities (Computer I), 28 FCC2d 267 (1971), aff’d in part and rev’d in part on other grounds, GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973). Structural separation is a “permissible regulatory tool” for matters within the Commission’s jurisdiction, Computer & Communications Industry Ass’n v. FCC, 693 F.2d 198, 219 (D.C. Cir. 1982), and imposition of pro-competitive conditions to a merger that might otherwise affect competition adversely is well within the Commission’s jurisdiction.

Divestiture is a common remedy to cure the anti-competitive effects of a merger, and may be used to ““pry open to competition a market that has been closed by defendants’ illegal restraints.”” Ford Motor Company v. United States, 405 U.S. 562, 573-74 (1972), quoting International Salt Co. v. United States, 332 U.S. 392, 401 (1947). A prominent example of divestiture to remove the incentive and ability to exploit a bottleneck monopoly was the AT&T

Consent Decree, which imposed a structural solution to remove the incentive and ability of AT&T to exploit its control of local access lines to discriminate against long-distance competitors. United States v. American Tel. and Tel. Co., 552 F.Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). In that case, as here, the structural remedy met “the requirements for an antitrust remedy . . . [it] effectively opens the relevant markets to competition and prevents the recurrence of anticompetitive activity.” Id., 552 F. Supp. at 153.

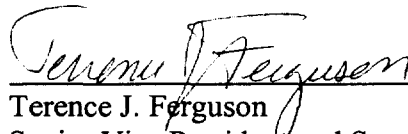
The 1996 Act does not alter the Commission’s authority to use structural separation as a regulatory tool. Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 13 FCC Rcd 6040, ¶ 55 (1998). Indeed, the 1996 Act highlights the necessity for structural separation, by mandating the competitive access and interconnection that SBC and Ameritech are assiduously avoiding. A structural solution such as that previously proposed by Level 3 -- in which the ILEC would divest its bottleneck facilities (loops and wirecenters) while retaining non-bottleneck facilities (including switches and transport facilities)³² – would eliminate the incentive and ability that the merger will enhance to engage in the type of obstructive tactics that SBC and Ameritech have been using to foreclose the competitive interconnection and network access mandated by the 1996 Act.

³² This type of structural solution is discussed in the comments filed March 23, 1998, by Level 3 Communications, Inc. in Petition of LCI Telecom Corp. for Declaratory Rulings, CC Docket No. 98-5.

In the Bell Atlantic-NYNEX merger, the Commission utilized conditions as a means of addressing potential anti-competitive effects,³³ and in the MCI-WorldCom merger, pre-merger divestiture was a significant element in the Commission's finding that the merger would not harm competition by giving the merged company a dominant position in the Internet backbone.³⁴

Because this merger will strengthen and extend the monopoly power of the two companies and enhance their incentive and ability to undermine the competitive goals of the 1996 Act, structural separation requirements to enhance competition would be an appropriate precondition to merger approval.

Respectfully submitted,



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³³ Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, 12 FCC Rcd 1998, ¶¶ 177 et seq. (1997).

³⁴ Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., CC Docket 97-211, Memorandum Opinion and Order (Sep. 14, 1998), ¶¶ 151-156.

CERTIFICATE OF SERVICE

I, Teri Lee Amaya, hereby certify that on November 16, 1998, a true copy of **Reply Comments of Level 3 Communications, Inc. In Opposition To Application For Transfer of Control** was served on the following people via United States Postal Service first-class mail, postage pre-paid. Those persons marked with an asterisk were served by hand delivery.

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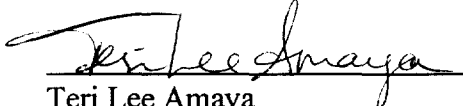
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